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SUMMARY RECORD OF THE 26th MEETING

Chairman:	Mr. TOMKA (Vice-Chairman)	(Czechoslovakia)
later:	Mr. ZARIF (Chairman)	(Islamic Republic of Iran)

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In the absence of Mr. Zarif (Islamic Republic of Iran), Mr. Tomka (Czechoslovakia), Vice-Chairman, took the Chair.

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (A/47/10, A/47/95, A/47/441-S/24559) (continued)

1. Mr. PUISSOCHET (France), referring to the question of international liability for injurious consequences arising out of acts not prohibited by international law, said that he would focus his remarks on the decisions taken in that respect by the International Law Commission. Noting that at the current stage of its work, the Commission had not yet been able to decide on the exact scope of the topic or on the conceptual obstacles encountered, he said that that was largely attributable to the overlap between the study being carried out by the Special Rapporteur and the question of State responsibility for wrongful acts, consideration of which should, in his view, be concluded first. Accordingly, he approved of the Commission's decision to proceed step-by-step, to establish priorities among the issues to be addressed, and to begin by considering the question of prevention.

2. With regard to the other facets of the issue, in his report the Special Rapporteur envisaged that, together with a set of rules calling on States to take unilateral measures of prevention by adopting regulations relating to their industrial or other activities likely to cause transboundary harm, another distinct set of rules should establish rules regarding the civil liability of private operators. Although that approach deviated from the mandate given to the Commission, it deserved attention, as at present, under the conventions in force regarding liability, primary liability in the case of harm was borne by the operator.

3. The Commission, which planned to focus successively on preventive and remedial measures - the latter, in its view, covering measures designed to mitigate the harm, measures intended to restore the conditions which existed prior to the occurrence of the harm, and pecuniary compensation - should indicate more clearly the need for a distinction, with regard to the second part of the question, between the possible - and no doubt residual - liability of the State and that of the operator. Once the study on prevention - and perhaps on measures designed to mitigate the harm, which had a different rationale although they could be of considerable practical importance - had been completed, the Commission should consider at greater length the general problems of liability for risk, in connection with the primary liability of the operator, rather than immediately drafting articles. Such consideration would be in line with principle 21 of the Stockholm Declaration or principle 13 of the Rio Declaration. Careful consideration of both the legal and the practical aspects of the issue was, however, clearly necessary before any thought was given to the general codification, or even the development, of the law in that sphere.

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4. Furthermore, with regard to the nature of the articles or the instrument to be drafted, his delegation took the view that it would be advantageous to take an immediate decision, as that would considerably facilitate the work. It was vital, particularly in a new sphere, to decide whether the aim was to establish obligations or recommendations. In the former case, a considerable effort would be required both to determine the scope of the obligations in question and their content and to examine their acceptability to States. In the latter case, it would be possible to be more general, and, perhaps, bolder, while remaining reasonable, as it would be the responsibility of States themselves to implement the proposed line of conduct, depending on the circumstances in each case. In that connection, his delegation considered that in the current state of international law, the most useful and constructive approach that the Commission could adopt would be to prepare something in the nature of a code of principles that might contain variants, to which States could refer when establishing specific regimes of liability in treaties. In the circumstances, the Commission should direct its efforts towards developing non-binding provisions for the draft as a whole, and not merely for the proposals relating to prevention.

5. Turning to the question of State responsibility, he doubted whether it was opportune to address the issue of countermeasures under that topic, as he was not convinced that countermeasures, which in some respects constituted means of enforcement, fell precisely within the scope of the question of State responsibility, even if they were linked to it. By broadening the subject, the Commission might find itself addressing particularly sensitive issues. It thus ran the risk of being led beyond the limits which it had itself set, by concerning itself with so-called "primary" rules - in particular, the definition of the areas in which countermeasures would be prohibited - or of being tempted to raise problems regarding the interpretation of specific treaties which should remain outside the scope of its study. There was a danger that consideration of the problem of countermeasures might delay the completion of the work. However, although his delegation considered that the issue should be addressed with great caution, it would examine with interest the texts which the Commission would prepare on the topic.

6. A number of general remarks were required. In the first place, it seemed essential to establish more clearly the exact scope to be given to the term "countermeasures". Article 30 of the draft articles on responsibility gave an indirect definition by stating under the heading "Countermeasures in respect of an internationally wrongful act" that "the wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act consitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State". However, in 1979 it had been pointed out that the wording of that article was vague and seemed to contain an inherent contradiction between the first part of the sentence, which used the term "wrongfulness" and the second, which referred to a "measure legitimate".

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7. The debates during the forty-fourth session of the Commission had given rise to divergent views on a fundamental issue. Some members of the Commission had stressed "that the notion of countermeasures was broader than that of reprisals and encompassed in particular retortion and more generally all the forms of lawful reaction to unlawful conduct". The fact that consideration had been given to excluding prohibited countermeasures, the withdrawal of ambassadors or the breaking off of diplomatic relations, might follow the same line of reasoning, if it implied that the acts in question should be considered "countermeasures" as defined by the draft. However, it seemed clear that the draft articles under discussion did not, and could not, seek, to regulate acts that were lawful per se. It was difficult to imagine, to use the same example, that the withdrawal of an ambassador could be preceded by compliance with the conditions set out in article 12. Accordingly, he shared the opinion of the members of the Commission and of the Rapporteur, set out in paragraph 150, that measures of retortion had no place in the draft. It was difficult to see why such a measure should be subject to a requirement of proportionality when it was in response to a wrongful act, and not when it was in response to an unfriendly act. Accordingly, it would be necessary to state explicitly, perhaps in a commentary, that in the event of a violation of their rights, States could freely resort to all licit measures, including retortion, which was in principle within their discretionary powers. Such a clarification would have the further advantage of drawing attention to the fact that means other than "countermeasures" could contribute to the restoration of law.

8. The second general remark concerned the fact that the Commission should refrain from taking any decision that would entail a conflict between the draft under discussion and the decisions reached at San Francisco since the Commission had no mandate to interpret the Charter. Although he readily agreed that armed reprisals were generally held to be prohibited by the Charter and that the requirements for self-defence were laid down in Article 51, he could not go along with some of the views and interpretations put forward during the debate. In his opinion, it would be counterproductive to ignore the scope of Article 103 of the Charter or to adopt positions tending to restrict the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security.

9. Also from the general angle, his delegation believed that the aim of countermeasures was to bring about the cessation of the wrongful act, and that they were thus not of a punitive nature. In that connection, as the possible punitive nature of countermeasures had been linked to the notion of international crimes, he reiterated his delegation's reservations regarding the attribution of criminal liability to States.

10. With regard to the draft articles proposed by the Special Rapporteur and the discussions to which they had given rise, his delegation was in general agreement with the conditions for the legality of countermeasures, as set forth in draft articles 11, 12 and 13. In its view, countermeasures or

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reprisals - which could only be reprisals not involving the use of armed force - should not be considered, and had never been considered, to be unconditionally in conformity with international law. Any State which reacted to an initial violation of international law committed to its detriment by another State could not behave as it saw fit and disregard all its international obligations. In conformity with the Nausilaa ruling and the resolution adopted in 1934 by the International Law Institute, justification for an act was subject to the following conditions: a motive provided by a prior act, which was itself contrary to international law; the impossibility of obtaining satisfaction by other means; an unsuccessful sommation prior to the reprisal; proportionality between the reprisal and the injury.

11. Furthermore, the requirement that all amicable settlement procedures should be exhausted, although mitigated by article 12, paragraph 2 (b), was perhaps too strict, particularly in view of the time taken by certain procedures.

12. With regard to article 12, paragraph 2, his delegation could not fully subscribe to the observation that States could not resort to countermeasures once the Security Council had adopted sanctions under Chapter VII of the Charter. It was not clear on what grounds the intervention of an international body, regardless of the body concerned, would in itself exclude any possibility of countermeasures. Furthermore, it was in any event the responsibility of the Security Council to decide, if it so desired, whether or not its decisions excluded any others. With that reservation, article 12 could be revised along the lines indicated in paragraph 204 of the report (A/47/10).

13. The principle set out in article 14, that certain countermeasures should be prohibited, was acceptable to his delegation, which believed that such a prohibition was essential in cases relating to fundamental human rights, the rights of persons against whom reprisals were prohibited under the 1949 Geneva Conventions, and the inviolability of diplomatic and consular personnel and premises. However, despite the precaution taken by the Special Rapporteur to address only "extreme" acts, paragraph 2, raised a problem of principle in so far as it directly assimilated measures of political or economic coercion, the aim of which, in that context, would be to compel a State to comply with the law, to the threat of or use of force as defined by the Charter. It thus constituted an interpretation of the Charter, an exercise from which the Commission should refrain. It would seem more judicious not to attempt to address that problem, or in any case not on the basis of one of the principles of the Charter.

14. With regard to the question of so-called "self-contained regimes" (A/47/10, paras. 251 to 259), he said that it was not for the Commission to make any general abstract pronouncement as to whether States parties to a treaty that contained special rules concerning the consequences of the violation of their substantive obligations could, or could not, in certain

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circumstances, simultaneously or as a last resort, resort to countermeasures under general international law. The issue concerned the interpretation of treaties, a matter which was not within the competence of the Commission, or at least not within the framework of its current study, and which could result in a different response in each case. Clearly, the situation was not the same in the case of an instrument which contained extremely lax procedures regarding relations between the States parties and instruments, such as the treaties instituting the European Economic Communities, which, apart from being of a highly original nature, included a court of justice with jurisdiction to decide on the matter.

15. His delegation was gratified that the Commission had decided to devote the first two weeks of its 1993 session entirely to the work of the Drafting Committee on the question of "State responsibility". However, it was afraid that the urgency attached to the preparation of a draft statute for an international criminal court might disturb those plans.

16. With regard to the Commission's programme and methods of work, his delegation endorsed the suggestion made by the Commission that it should not, for the time being, pursue the consideration of the second part of the topic on "relations between States and international organizations" as well as the idea that outlines should be prepared of each of the topics likely to be the subject of a study in the long term. Noting that for the moment the Commission had put aside the possibility of dividing its session in two parts, he said that his delegation would be prepared to reconsider the matter favourably at the appropriate moment. As for the work of the Drafting Committee, his delegation noted that the different working languages would be represented "as far as possible". In view of the differences of terminology between the various languages, his delegation believed that it was important for all of them to be represented on the Drafting Committee.

17. The suggestions concerning the contribution of the Commission to the Decade of International Law were very timely, in particular - subject to budgetary considerations that might constitute a an obstacle - the suggestions concerning the publication of a series of articles presenting an overview of the main problems of international law on the eve of the twenty-first century, and the holding of a conference on international law.

18. Mr. AL-BAHARANI (Bahrain), taking up the question of State responsibility, raised the question of the legal rationale for countermeasures and noted that the ILC was divided on the point, as was evident from its report (A/47/10). According to one view, which was stated in paragraph 124, reprisals or countermeasures were the prerogative of the more powerful State, and many small States regarded the concept as synonymous with aggression or intervention. Thus, countermeasures had no place in the law on State responsibility. Another view, as stated in paragraph 131, was that at the present stage countermeasures were the only means whereby international law could be implemented when an international obligation was violated. To solve

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the impasse, his delegation would propose a compromise solution under which the legal regime of countermeasures would provide for checks and balances so that they were not punitive and conformed to the principles and purposes of the United Nations Charter.

19. Draft article 11 proposed by the Special Rapporteur should be improved considerably so as to fill the lacunae resulting from over-vague formulation and the absence of a definition of countermeasures excluding from their purview a punitive purpose. In his delegation's view, the draft article in its present form might open the way to abuse by the more powerful States, which were, as history showed, most likely to resort to countermeasures.

20. His delegation also considered that draft article 12 was unclear and should be further refined. There was a lack of consensus among members of the ILC on several of the conditions stipulated in it. It would be desirable to review article 12 with a view to arriving at a consensus on the conditions governing countermeasures which would balance the interests of the injured State and of the wrongdoing State.

21. His delegation supported in principle the precondition stipulated in paragraph 1 (a) as well as the exception provided for in paragraph 2 (a), but did not think it was either necessary or desirable to enter into details, as the present text did. It agreed with the Commission that the second precondition, prescribed in paragraph 1 (b), was satisfactory. On the other hand, it had reservations with regard to the "interim measures of protection" in paragraph 2 (b), as that might contradict the spirit of the conditions stipulated in paragraph 1 (a). It had no objections, however, with regard to paragraph 2 (c). As to paragraph 3, it concurred with the general perception of the Commission that it was unclear. Nothwithstanding the explanation given in paragraph 205 of the report, it was not convinced that the paragraph was necessary, especially as a qualification to an exception. In short, the Commission should revise draft article 12 so as to specify the preconditions in as clear and unambiguous terms as possible.

22. The formulation of draft article 13, embodying the rule of proportionality, raised some difficulties. The Special Rapporteur had indicated in paragraph 206 of the report that he had opted for a negative rather than a positive formulation. In his delegation's view, the positive formulation was preferable to the negative inasmuch as it helped limit the subjective element in assessment of the injury suffered. The central purpose of a countermeasure should be to redress the injury suffered rather than to enable the injured State to engage in retribution. His delegation was also not sure that it was really necessary to specify the elements of "gravity" and "effects" of the injury in the text itself. Those details, like others such as the importance of the interest protected by the countermeasures, could as well be mentioned in the commentary to the article. That was why his delegation proposed that draft article 13 should be replaced by the following text:

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"Countermeasures taken by an injured State under Articles 11 and 12 shall be proportionate to the violation and the injury suffered".

23. Draft article 14 on prohibited countermeasures was probably the most important provision regarding the regime of countermeasures. There should be no doubt or controversy as to its scope and content as otherwise its purpose of prohibition would be defeated. The five kinds of prohibited countermeasures it dealt with did not have the same degree of intensity, the prohibition contained in (a) being of a more serious nature than those contained in paragraph (b). The question therefore arose of whether those prohibitions should all be in a single article and whether it was absolutely essential to have all of them. His delegation supported unequivocally the prohibition regarding the threat or use of force contained in paragraph 1 (a).

24. While his delegation was in agreement with the underlying idea of subparagraph (b) (i), it considered that the formulation lacked clarity and specificity. If the intention was to safeguard the "core" of human rights, it was better to specify the rights constituting that core. The subparagraph should at least define the threshold beyond which countermeasures could be allowed.

25. His delegation considered that the text of subparagraph (b) (II) was vague and misleading. It was doubtful that States should accept a restriction so broad. Moreover, it was not diplomatic operations as such that should be protected but the inviolability of diplomatic personnel and premises. His delegation would therefore suggest the modification of the text so as to restrict its application to inviolability of diplomatic personnel and premises.

26. His delegation considered that subparagraph (b) (iii) on jus cogens should be included in draft article 14, notwithstanding the fact that some or all of the preceding paragraphs contained elements of that postulate, as its retention might have a future use.

27. Subparagraph (b) (iv) contained sweeping formulations whose unreasonable effects were well described in paragraph 253 of the Commission's report. It was stated therein that the formulation seemed to deprive a State party to the International Covenant on Civil and Political Rights whose nationals were denied their freedom of movement in another State from the right to restrict the corresponding right of the nationals of the other State. His delegation considered that view unacceptable and urged the Commission to review the subparagraph.

28. His delegation felt that considerations of logic and principle necessitated the inclusion of draft article 14. In its opinion, it was logical that States should not be allowed to use political or economic coercion as a countermeasure. It therefore suggested that paragraph 2 should be combined with paragraph 1 (a) to read as follows:

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"an injured State shall not resort, by way of countermeasure, to the threat or use of force or to political or economic coercion which endangers the territorial integrity or political independence or sovereignty of the wrongdoing State".

29. His delegation considered that there was no need to include article 5 bis to Part Two, as any injured State within the meaning of article 5 of Part Two would in law be entitled to take the remedial measures for redressal of the injury. If, after examining more fully the implications of article 5 of Part Two it was found that there was a lacuna, then the matter could be re-opened.

30. Mr. YAMADA (Japan), commenting on the question of State responsibility, said it was unfortunate that the Commission had not been able to take action at its last session on the articles formulated by its Drafting Committee relating to the substantive rights of the injured State and corresponding obligations of the author State which would form Section 1 of Chapter II of Part Two. It was, however, happy to note the desire of the newly composed Commission to accelerate the pace of work on the subject. His delegation did not wish to comment on the articles drafted by the Drafting Committee at its last session but hoped that the Commission would review them taking fully into account current State practices. It sincerely hoped that the Commission could expedite its work and provide the General Assembly with the detailed projected outline of the entire draft treaty so that the Assembly could make appropriate input to the future work.

31. On the issue of the legal regime of countermeasures, he considered that in the absence of enforcement mechanisms for international law countermeasures remained an effective instrument to deal with internationally wrongful acts. It was therefore more appropriate to regulate such countermeasures than to avoid the problem. As the question of countermeasures was closely related to the dispute settlement regime, it would be worthwhile for the Commission to examine the limitation of countermeasures and dispute settlement at the same time.

32. In formulating the limitations on countermeasures, the Commission must take care to maintain a proper balance between the rights and the obligations of the parties concerned. The conditions must not be too loose, which would open the way to abuse, or too restrictive, which would place an undue burden on the injured State.

33. Regarding the relationship between the draft under elaboration and the United Nations Charter, his delegation stressed that pursuant to its Article 103, the Charter took precedence over all international treaties. The decisions or recommendations of the Security Council or the International Court of Justice on a specific wrongful act would undoubtedly have great bearing on the right of the injured State to resort to countermeasures. That could only be determined, however, when the case was actually taken up by the

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United Nations, and it was therefore not necessary for the Commission to stipulate in its draft any limitations which might derive from United Nations action.

34. With regard to the question of the plurality of differently injured States, the Commission would have to study further the categories which might arise. Leaving aside violations of such norms as those relating to disarmament and human rights, which concerned the whole international community, it often happened that wrongful acts directed against a given State also injured third States, given the interdependence that characterized the modern world. The kind and extent of the countermeasures to be allowed to each category of injured State must be elaborated, taking into account the degree of injury and the objectives which the countermeasures were designed to attain.

35. Mrs. ŠKRK (Slovenia) said that, in establishing a regime of countermeasures, it would be illusory to ignore the national interests of States. Furthermore, all the safeguards concerning the sovereign equality of States must be respected.

36. The term "countermeasures" was to be preferred to the term "reprisals" because it did not imply any punitive measure on the part of the injured State. The sole aim of countermeasures should be to oblige the law-breaking State to respect an international obligation, contractual or non-contractual. Of course, the means of achieving that end could not be left to the sole discretion of the injured State.

37. Any action taken as a countermeasure to a wrongful act must be in full conformity with the rules of jus cogens. Her delegation endorsed the view of the representative of Denmark, speaking on behalf of the Nordic States, that the Commission should regard countermeasures as a concept that was applicable in time of peace, whereas the concept of reprisals in armed conflict was the subject of the rules of war and should be dealt with separately.

38. The Slovenian Government had not yet determined its position on the question whether countermeasures had a place in future international law on State responsibility. The elaboration of draft articles concerning the settlement of disputes in Part Three also needed to be stressed. A well-balanced system for the settlement of disputes should be the best means of safeguarding the interests of the injured State. In that connection, the Commission should not take a negative attitude towards retortion simply because it did not constitute countermeasures in the strict sense. On the contrary, if the injured State was convinced that it could attain satisfaction only through an unfriendly but not unlawful act, it should be encouraged to do so.

39. Her delegation accepted the idea that the injured State resorting to countermeasures should act bona fide, and also that the Commission should take

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into account the possibility of an injured State resorting to reprisals with malicious intent or committing an abuse of the right.

40. In her delegation's view, the conditions for resort to countermeasures envisaged in draft article 12 were not clearly exposed. As a number of delegations had noted, they should be more logically set out. The interim measures envisaged in the same article could lead to confusion. In general, countermeasures should be an exceptional interim instrument, only to be used if the wrongfully acting State failed to comply with the regular procedures for the peaceful settlement of disputes.

41. The concept of proportionality, envisaged in draft article 13, was one of the most sensitive issues in regard to countermeasures. The rule would inevitably create practical problems. In general, countermeasures should not be out of proportion to the wrongful act. It should be made clear, however, whether the degree of gravity of the act was to be measured by objective criteria or whether it could be left to the subjective assessment of the injured State.

42. The prohibited countermeasures listed in draft article 14 enshrined a "threshold" of permissiveness in contemporary international law. In her delegation's opinion, the list of prohibited countermeasures should be indicative, not exhaustive. There seemed to be a general agreement, with which her delegation concurred, about prohibiting the threat or use of force as a countermeasure. Countermeasures that violated fundamental human rights should also be prohibited. Similarly, the injured State should not be able to invoke the rule of reciprocity in order to justify countermeasures contrary to those fundamental rights. Countermeasures must not, therefore, be contrary to a peremptory norm of jus cogens. The fact that there was not yet in international law a complete system of jus cogens norms should not diminish the importance of jus cogens in any discussion of the issue of State responsibility.

43. The relationship between self-contained regimes and countermeasures required some further elaboration. The measures envisaged in those regimes could, however, be treated as lex specialis and given priority over the general regime drawn up by the Commission for countermeasures within the concept of State responsibility.

44. Lastly, on the question of situations where there was more than one injured State because of the infringement of an erga omnes obligation, it would seem that, in draft article 5 bis, the Special Rapporteur had recognized each injured State as having the right to resort to countermeasures. However, the locus standi of injured States had been treated in a rather restrictive way by international tribunals, including the International Court of Justice. That reservation required the approach adopted by the Special Rapporteur in that respect to be reconsidered.

45. Mr. TUERK (Austria), noting that State responsibility was probably one of the most difficult questions of international law to codify, welcomed the very real progress made by the International Law Commission at its latest session. With a concerted effort, the Commission should be able to submit the end-product of its work on the subject to the international community before the end of its current members' term of office.

46. Turning to the substance of the topic, he said that the problem of countermeasures called for a number of comments.

47. On the question whether the draft should regulate countermeasures, his delegation was in agreement with what seemed to be the most realistic approach, namely that countermeasures were likely to survive in international relations for a rather long time. It would be unrealistic to believe that they could be abolished by a stroke of a pen in the foreseeable future, and it was therefore essential that there should be a precise set of international norms to prevent any possible abuse. Accordingly, his delegation could not agree to the exclusion of a provision on countermeasures.

48. As far as the use of terms was concerned, his delegation agreed with the view prevailing in the Commission that, although the measures in question in substance constituted reprisals, they ought to be referred to as "countermeasures", because the notion of reprisals should not be maintained in modern international law. In addition, the terminological distinction between "interim measures of protection" and "countermeasures" should be reconsidered and, if maintained, be made more comprehensible by clearly stating the difference. The Commission's report referred to "certain minimum preconditions" for interim measures of protection, and the question arose as to what was meant by those preconditions. Since no fundamental difference of content seemed to exist between "interim measures" and "countermeasures", the only apparent difference was the exemption of the former from the exhaustion of dispute settlement procedures established by draft article 12 (1) (a). It would be wiser to dispense all together with the notion of "interim measures as protection".

49. With regard to draft article 11, his delegation supported the approach taken, i.e., that the conditions for a lawful resort to countermeasures were the existence of an internationally unlawful act and the prior submission by the injured State of a demand for cessation or reparation. With regard to article 12, on conditions of resort to countermeasures, he noted that paragraph 1 (a) stipulated that all available amicable settlement procedures must be exhausted. That approach had been criticized by a number of members of the Commission. Paragraph 2 (a) of the same draft article, in addition, set out the requirement that the State which had committed a wrongful act must cooperate "in good faith" in the choice of amicable settlement procedures. Such a requirement was not an effective safeguard, as it would, in practice, be very difficult to demonstrate that, for instance, negotiations had been "unduly" delayed. The provision thus appeared unrealistic and invited transgressions, as measures taken might be labelled as "interim measures of

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protection" instead of "countermeasures". His delegation held the view that the proposal made in the Commission to make the exhaustion of amicable settlement procedures not a precondition for resorting to countermeasures, but a parallel obligation - in other words, to provide for a regime in which the right to impose countermeasures would be suspended if a wrongdoing State agreed to a dispute settlement procedure in which a legally binding determination as to the wrongfulness of the act could be reached and reparation required. Another solution might consist in the establishment of a time-limit.

50. As to draft article 12 (3), the Austrian delegation concurred with the view generally expressed in the Commission that the wording of the provision was unclear. The Special Rapporteur's explanation concerning the need for a provision of that kind seemed quite convincing, but the text as currently formulated did not seem to sufficiently reflect that explanation.

51. Turning to draft article 13, he said that his delegation shared the view of many members of the Commission with regard to the vague nature of the notion of proportionality and the difficulty of deciding, other than subjectively, whether a countermeasure was proportional to the wrongdoing. As had been stated in the Commission, if the countermeasure was to be proportionate to the injury, it took a punitive character, while the true criterion should rather be that a countermeasure would be necessary to bring about correction and recourse to a peaceful settlement procedure. That approach might offer a way for a more precise definition of proportionality, which was indispensable if the draft article was to be retained.

52. With respect to draft article 14, his delegation wondered whether the introduction of the notion of "fundamental human rights", in paragraph 1 (b) (i) - or "the core of human rights", as referred to by the Special Rapporteur - was a very happy one. One might sympathize with the idea that probably not all the human rights embodied at present or in the future in international instruments were necessarily exempt from countermeasures. A very convincing example - the freedom of movement - was given in the report in conjunction with the regulation of erga omnes obligations in paragraph 1 (b) (iv) of draft article 14. It would, however, appear that a more precise line of demarcation should be drawn between absolutely protected human rights and others that might legitimately become the object of countermeasures. Such a line of demarcation might be a reference to those rights from which no derogation was permissible under the relevant international human rights instruments, and such rights could under no circumstances whatsoever legitimately become the object of countermeasures.

53. As far as paragraph 1 (b) (ii) of draft article 14 was concerned, it was, in the opinion of the Austrian delegation, difficult to determine what was meant by the "normal operation of bilateral or multilateral diplomacy". The Special Rapporteur seemed to imply that diplomatic inviolability or immunity might become the object of countermeasures provided that the human rights of

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diplomats were not thereby infringed. His delegation shared the view expressed by several members of the Commission that countermeasures should not threaten the inviolability of internationally protected persons or premises. The breaking off of diplomatic relations would under that draft provision still be possible. Such a course of action could be legitimate under certain circumstances, but it should be recognized that such an act greatly affected the normal operation of bilateral diplomacy.

54. The discussion in the Commission concerning the proposed paragraph 2 of draft article 14 tended to confirm the view of his delegation that it would not be wise to reopen the discussion on the meaning of the term "force". His delegation would like to sound a note of caution with regard to the possible introduction of new elements into the United Nations Charter or trying to interpret or reinterpret it through the present set of draft articles. The suggestion - also contained in the report - to prohibit countermeasures which jeopardized the territorial integrity or political independence of States seemed to be the best solution since it was concurrent with the definition of intervention, the prohibition of which was considered to be part of jus cogens.

55. Concerning the question of countermeasures in the context of draft article 2 of Part Two, provisionally adopted, his delegation tended to support the view expressed by the Special Rapporteur that, in all cases, there was a "fall-back" entitlement to resort to the remedies provided for under general international law. His delegation also supported the request by the Special Rapporteur to amend draft article 2, because self-contained regimes did not completely replace the regime of State responsibility. That approach, however, also underlined the need to reach a more precise demarcation line with respect to human rights and diplomatic law.

56. With regard to draft article 5 of Part Two, provisionally adopted, defining an "injured State", and the proposed article 5 bis dealing with the question of there being more than one injured State, he said that his delegation held the view that the problems arising in that connection were genuine. A further in-depth discussion was required in the Commission, in particular in view of the fact that the concept of erga omnes obligations was still rather immature. The consequences of the proposed new article 5 bis needed to be carefully studied before the final position could be taken.

57. Addressing the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he thanked the Special Rapporteur for his continued efforts on that topic. The subject was particularly important since it raised many problems relating to the development of international environmental law. The extreme complexity of the issue became very clear from a reading of the relevant chapter of the most recent report of the International Law Commission. It would probably be very difficult to elaborate one single regime for the protection of the environment. A functional, sector-by-sector approach leading to separate instruments for different situations which would include applicable primary

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rules might be preferable to the commendable, but certainly ambitious, attempt to devise a unified legal regime.

58. His delegation shared the concern expressed by many members of the Commission that the theoretical and conceptual basis of the topic had not yet been clearly defined. That lack of definition had undoubtedly contributed to the fact that, after 14 years, the Commission had still not come forward with really tangible results. Austria appreciated the establishment of a Working Group by the Commission to consider the possible direction of the future work on the topic, as well as the decisions taken by the Commission, including its recommendations to the Special Rapporteur.

59. He wished to state once again his delegation's consistent position that the topic should cover the duty to avoid, minimize and repair physical transboundary harm resulting from physical activities within the territory or control of a State. Going beyond that would lead to almost insurmountable difficulties. It should also be borne in mind that the concept of liability for acts not prohibited by international law related to two fundamentally different situations which required a different approach. In one situation, it was a question of hazardous activities which involved a risk of disastrous consequences in case of accident but did not have adverse impacts in their normal operation. By its very nature, liability in such a situation must be absolute and strict, permitting no exceptions. However, the Commission must also envisage a fundamentally different situation: transboundary and long-range impacts on the environment. In that case, the risk of accident was only one, and even a minor, aspect of the problem. It was the normal operation of some activities that caused prejudice to the environment of other States. Moreover, that harm was not produced by a single, identifiable source, as in the case of hazardous activities; there was a multitude of sources which produced harmful effects through their accumulation. Liability therefore had two distinct functions: in the case of hazardous activities, it must cover the risk of an accident, but it must also, and that was its essential function, cover significant harm caused in the territory of other States through normal operation. Liability for risk must thus be combined with liability for a harmful activity.

60. At the current juncture of the debate on the topic, he wished to make just a few comments on some of the points raised in the Commission.

61. First of all, unlike some members of the Commission, his delegation did not believe that a civil liability regime where operators had to bear the cost of the harm they caused and an effective international insurance scheme would be sufficient. Such systems were certainly extremely valuable but they could not really guarantee adequate compensation under all circumstances to the innocent victims of such activities. Thus, civil liability should not entirely exclude the liability of States. Furthermore, the topic should not only apply to transboundary harm but should also cover activities causing harm to the global commons.

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62. On draft article 1, relating to preventive measures, his delegation shared the opinion that it was only fair to require States to allow activities that had the potential of causing transboundary harm to be conducted only after reviewing their environmental impact assessment. In addition, the granting of permission to conduct such activities should not be considered an exclusively internal affair. Thus, prior consultation by the State of origin with the affected States before undertaking or authorizing an activity with harmful effects, as proposed in draft article 4, seemed very necessary.

63. In principle, his delegation was also sympathetic to the opinion that draft article 5 should state that, if the operator was unable to put forward acceptable alternatives, the State of origin could not authorize the proposed activities. Such a provision would, however, give a virtual veto to other States over a presumably lawful activity intended to be carried out in one State. It was doubtful whether States were at present ready to accept such a far-reaching limitation of their sphere of action, no matter how desirable it might seem to be.

64. Regarding the question of risk, the position taken by some members of the Commission on draft article 6 seemed realistic: neighbouring States should not have a veto over a State's projected activities, provided that appropriate procedures had been followed to minimize the risk of harm.

65. The Commission's decision that the scope of the topic should be understood as comprising both issues of prevention and of remedial measures, prevention being considered first, seemed reasonable to his delegation, although it circumvented the real problem, which lay in the topic's relationship with the topic of State responsibility. In the course of its work on the topic of international liability, the Commission must reach a conclusion on the issue of whether international law did or did not prohibit in principle activities that caused significant transboundary harm. If such a prohibition were to be found to exist, the matter should be dealt with under the topic of State responsibility and not separately.

66. As to the nature of either the draft articles or the eventual form of the instrument to be elaborated, it might be wise, at least in the first phase, to aim for a declaration or statement of principle. Only when a consensus among the members of the international community on the substance of such provisions seemed to be emerging would an effort to lay down binding rules have a reasonable chance of success. In the case in point, therefore, his delegation believed that the Commission should not wait until the completion of its work to take a decision in that respect.

67. Chapter V of the Commission's report, "Other decisions and conclusions of the Commission", was the shortest but by no means the least important: it provided the framework for the Commission's work and was thus of the greatest interest to the General Assembly.

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68. His delegation welcomed the appointment of Mr. Rosenstock as Special Rapporteur for the topic "The law of the non-navigational uses of international watercourses". The topic was particularly important, and Austria was convinced that Mr. Rosenstock would do everything in his power to ensure rapid progress in that field, continuing where his predecessor, who had done an excellent job in a relatively short time, had left off. Austria hoped that it would be possible to complete the second reading of the draft articles on the topic by 1994, as envisaged by the Commission.

69. His delegation had been pleased to note that the Commission shared the view consistently expressed by Austria in the Sixth Committee that the topic "Relations between States and international organizations (second part of the topic)" did not seem to respond to a pressing need of States or international organizations. The Commission's decision not to pursue that topic further during the current term of office of its members was certainly very wise. His delegation could not approve any decision to the contrary in the General Assembly.

70. In considering the work performed by the Commission at its forty-fourth session and the planning activities for the current quinquennium, his delegation had noted some welcome changes. It seemed that many of the comments made in the Sixth Committee by a number of delegations, including the Austrian delegation, on the Commission's working methods had been taken into account. Austria was confident that the Commission would be able to achieve the goals it had set itself for the current term of office of its members. Nevertheless, regarding one or more new topics, a note of caution should be sounded. It was certainly necessary to pursue the effort to identify topics which could be recommended to the General Assembly for inclusion in the Commission's programme of work, but actual work on such new topics should commence only when work on all, or at least all but one, of the topics currently on the Commission's agenda had been completed.

71. Regarding the choice of new topics, it was important to try to ascertain beforehand whether the subject matter really lent itself to codification and whether there was a reasonable chance that the product of the Commission's work would be accepted by the international community. In the past, that had not always been the case and a group of eminent international lawyers such as the members of the Commission could not be asked to work intensely for many years to no purpose. Extreme care must therefore be taken in choosing any new topic.

72. His delegation had noted with appreciation that the Commission had heeded the plea made by many delegations to reduce its report to more manageable proportions. Austria also welcomed the guidelines adopted on the preparation and content of the report. Lastly, Austria remained convinced that dividing the Commission's annual session into two parts would contribute to improving productivity. It hoped the Commission could reconsider the matter in due course.

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73. The International Law Seminar was a highly valuable institution for the training of young international lawyers, in particular from developing countries. His delegation therefore hoped that the Decade of International Law would prompt more Governments to make a financial contribution to the Seminar so that its scope could perhaps be expanded.

74. Mr. RIDRUEJO (Spain) said that the question of countermeasures had its rightful place in the legal regime governing the international responsibility of States. There was no denying that the most powerful and developed States would be able to take countermeasures more easily than smaller or less developed ones, but it should not be forgotten that countermeasures could also be applied among States of comparable might.

75. Although it was true that countermeasures could give rise to abuse, it was equally undeniable that States had always resorted to them and would continue to do so. In those circumstances the best way of guarding against abuse was strictly to codify the application of countermeasures.

76. His delegation shared the view of the Special Rapporteur that measures of retortion had no place in the draft being prepared: such measures were always licit, and as such were clearly distinguished from countermeasures. Regarding draft articles 11 to 14 as proposed by the Special Rapporteur, it would be necessary to review the wording of article 14, as the fact that the article explicitly referred to jus cogens rules could lead to interpretations a contrario sensu which would cast doubt precisely on the peremptory nature of those rules.

77. As to the relationship between the draft articles under preparation and the Charter of the United Nations, his delegation recalled that only decisions taken by the Security Council pursuant to Chapter VII of the Charter were binding. Where the settlement of disputes was concerned, the Security Council could only make recommedations and, pursuant to Article 40 of the Charter, call upon the parties concerned to comply with such provisonal measures as it deemed necessary or desirable. It was in that respect that the distinction between interim measures of protection and definitive measures acquired its full importance. As Article 103 of the Charter stipulated that the obligations of Member States under the Charter should prevail over any other international agreement, his delegation wondered whether it was advisable to retain article 4.

78. Regarding international liability for injurious consequences arising out of acts not prohibited by international law (chap. IV of the report), his delegation was gratified that the Commission had recognized the major role it had to play in the sphere of environmental protection. That was a sphere, in which State responsibility might be involved, either because of a violation of the primary rules of international law in which case the resulting responsibility was made clear in chapter III of the report, or because of a simple obligation to provide reparation, which was covered by chapter IV. For

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that reason, Spain had no objection to the Commission deciding to include in its future programme of work a topic entitled: "Legal aspects of the protection of the environment of areas not subject to national jurisdiction".

79. Another topic to which the Commission could devote its attention was the non-application of a number of conventions codifying or developing international law, and which, although formally adopted, had not come into force: one could cite in that respect the conventions on special missions, the representation of States in their relations with international organizations of a universal character, and succession of States. Lastly, his delegation thought that the task to which the Commission should give priority was the preparation of a draft statute of an international criminal court.

80. Mr. Zarif (Islamic Republic of Iran) took the Chair.

81. Mr. GOMEZ ROBLEDO (Mexico) introduced the document entitled "International responsibility of the State for wrongful acts (a historical and critical study)" (A/47/95). The study was a response to two essential concerns: it was designed first of all to make an assessment of the work carried out by the Commission since 1949 in the area of State responsibility, and secondly to inform the Commission of the position of the Government of Mexico regarding the progress made.

AGENDA ITEM 135: ADDITIONAL PROTOCOL ON CONSULAR FUNCTIONS TO THE VIENNA CONVENTION ON CONSULAR RELATIONS (A/47/327 and Add.1.; A/C.6/47/L.7)

82. Mrs. FLORES (Vice-Chairman, Chairman of the informal consultations) introducing the report on the informal consultations held on agenda item 135, "Additional protocol on consular functions to the Vienna Convention on Consular Relations", pursuant to General Assembly resolution 46/61, said that the report (A/C.6/47/L.7) summarized the results of each of the meetings held between the end of September and the end of October 1992. It set out the trends that had emerged and the main opinions expressed. As was apparent from paragraphs 11 and 12 of the report, two bodies of opinion had emerged but neither of them had commanded a consensus. For that reason, as stated in paragraph 13, in the absence of agreement on the substance as well as on the procedures to be followed, the participants in the informal consultations suggested that the Sixth Committee should recommend to the General Assembly that it should take note of the report. To conclude, she thanked the sponsors of the proposal, Czechoslovakia and Austria, as well as all the delegations which had taken part in the informal consultations.

83. The CHAIRMAN said that as no further delegations wished to take the floor, the Committee had thus completed consideration of agenda item 135. He understood that a draft resolution had been considered during informal consultations. Accordingly, he requested the Chairman for informal consultations to submit the draft resolution to the Committee as soon as possible.

The meeting rose at 5.15 p.m.